IN THE SUPREME COURT OF THE STATE OF DELAWARE

DANNY BENTON,	§	
	§	No. 384, 2010
Defendant Below,	§	
Appellant,	§	Court Below–Superior Court
	§	of the State of Delaware in
v.	§	and for Sussex County
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	Cr. ID No. 0901013870A
Appellee.	§	

Submitted: November 10, 2010
Decided: February 4, 2011

Before **STEELE,** Chief Justice, **HOLLAND** and **RIDGELY,** Justices.

O R D E R

This 4th day of February 2011, upon consideration of the appellant's brief filed pursuant to Supreme Court Rule 26(c) ("Rule 26(c)"), his attorney's motion to withdraw, and the State's response, it appears to the Court that:

(1) In April 2009, the appellant, Danny Benton, was indicted for eight counts of Rape in the First Degree ("Rape First"), eight counts of Rape in the Second Degree ("Rape Second"), eight counts of Unlawful Sexual Contact in the First Degree ("USC First"), and one count of Continuous Sexual Abuse of a Child ("CSAC"). On March 22, 2010, Benton was charged by superseding indictment with four counts of Rape First, eight

counts of Rape Second, eight counts of USC First, one count of CSAC, and two counts of Criminal Contempt.

(2) On March 24, 2010, after a two-day jury trial, Benton was convicted as charged in the superseding indictment (with the exception of the two counts of Criminal Contempt, which were severed prior to trial). On June 11, 2010, the Superior Court sentenced Benton as follows: forty-five years for the first conviction of Rape First and twenty-five years for each additional Rape First conviction; ten years for each conviction of Rape Second; five years for each conviction of USC First, and twenty-five years for CSAC. This appeal followed.

(3) On appeal, Benton's defense counsel ("Counsel") and the appellee, State of Delaware, agree that the Superior Court erroneously sentenced Benton on eight counts of Rape First as charged in the April 2009 original indictment instead of four counts of Rape First as charged in the March 2010 superseding indictment. The Court agrees with Counsel and the State that the record reflects plain error with respect to the sentence imposed and will remand this matter for resentencing.

(4) With respect to Benton's criminal convictions, Counsel has filed a brief and a motion to withdraw pursuant to Rule 26(c). Counsel asserts that, based upon a careful and complete examination of the record,

there are no arguably appealable issues with respect to the convictions. Counsel states that he provided Benton with a copy of the motion to withdraw and the accompanying brief and appendix. Counsel also asked Benton to submit any issues that Benton sought to raise on appeal. Benton has not raised any issues for this Court's consideration. The State has responded to the position taken by Counsel and has moved to affirm the Superior Court's judgment.

(5) The standard and scope of review of a motion to withdraw and an accompanying brief under Rule 26(c) is two-fold. First, the Court must be satisfied that Counsel has made a conscientious examination of the record and the law for claims that could arguably support the appeal.[1] Second, the Court must conduct its own review of the record and determine whether the appeal is so devoid of at least arguably appealable issues that it can be decided without an adversary presentation.[2]

(6) In this case, the Court has reviewed the record carefully and has concluded that Benton's appeal is wholly without merit and devoid of any arguably appealable issue with respect to his criminal convictions. We are satisfied that Counsel made a conscientious effort to examine the record and

[1] *Penson v. Ohio*, 488 U.S. 75, 83 (1988); *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 442 (1988); *Anders v. California*, 386 U.S. 738, 744 (1967).
[2] *Id*.

the law and properly determined that Benton could not raise a meritorious claim in this appeal as to the convictions.

NOW, THEREFORE, IT IS ORDERED that:

A. The State's motion to affirm is GRANTED IN PART. The judgment of the Superior Court with respect to Benton's convictions is AFFIRMED.

B. The June 11, 2010 sentence (as corrected on July 30, 2010) is VACATED. This matter is REMANDED to the Superior Court for resentencing, upon notice, with Benton and defense counsel present. Jurisdiction is not retained.

BY THE COURT:

/s/ Myron T. Steele
Chief Justice